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United States Circuit Court of Appeals

For the Ninth Circuit

K. MATUSAKE,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NINTH DIVISION.

REPLY BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT.

Counsel for the Government in their three page answering brief, ask for the confirmation of the judgment of the trial court, which is tantamount to asking for a dismissal of defendant's appeal.

The reason for this most drastic demand and proceedure are that defendant presumed to, and did, move to suppress the evidence secured under an alleged void search warrant which was coupled with a statement that the liquor seized did not belong to him. It is also alleged that the brief of appellants alleges no other grounds of error.

Neither of the counsel whose names appear on their brief participated in the trial of the cause in the district court and their want of knowledge concerning the facts and the contents of appellant's brief is most glaring. A brief review will probably be beneficial to all concerned in this appeal.

Defendant conducted a hotel in a brick building at the corner of Sixth Avenue South and Weller Street in the City of Seattle. The building consisted of three floors and a full basement. See Exhibit A 1 pg. 52 of record. The defendant's hotel was on the second and third floors. The heating and hot water plant for the hotel were located in the southeast corner of the basement. There were two rooms, one for baggage and one for the boilers. The baggage room was not used by appellant. A partition between these two rooms connected them with a door. These two rooms were included in the hotel lease.

The defendant sublet the baggage room to an expressman, reserving the right of ingress to fire the boilers. Defendant's exhibit A 2 pg. 50 of record.

The liquor was all hid from view and was kept in containers that were put into boxes and suitcases and some of it was hidden in a blind stairway in the boiler room. The evidence secured under the search warrant was found in the baggage room and the blind stairway.

On pages 13, 14 and 15 of the record, we find one of the assignments of error was the overruling of the motion to suppress the evidence taken under a void search-warrant; another was overruling a motion to quash the search warrant and another related to the introduction of the evidence secured by the warrant. Then there follows an assignment that the court overruled a motion for a new trial which covered all of the rulings relating to the introduction of the evidence and rejection of instructions.

The grounds for the motion for a new trial will be found on page 8 of the record and are:

Errors of law occurring at the trial and excepted to at the time by the defendant, which pre-

vented the defendant from having a fair trial.

Newly discovered evidence.

The verdict is not supported by the evidence and is contrary to the testimony in said cause.

Counsel dare not discuss the many errors recited in appellant's opening and supplemental briefs. Their only answer is to plead an estoppel. They say that defendant may not plead that the search warrant used against him is absolutely void unless it be coupled with an admission that he is the owner of the liquor seized. In other words, defendant must admit his guilt, though innocent, before he can avail himself of the right to a full and complete defense. No appellate court has ever held that a party charged with crime will not be permitted to plead that a search warrant or any other warrant, is absolutely void. We do not mean voidable, but void, if it injuriously affects the defendant's life, liberty or property.

We also challenge counsel to discuss the questions raised in the record and in our opening brief, viz:

FIRST:

That under the Volstead Act and the Search

and Seizure Act of June 15th, 1917, a Search Warrant cannot be issued in misdemeanor cases.

SECOND:

The Court's refusal to instruct the jury on *falsus in uno, falsus in omnibus,* in the face of the most deliberate and wilful perjury, by Prohibition Agents.

In the *Agnello* case cited by counsel in their brief, Justice Butler says:

> "Where by uncontroverted facts, it appears that a search and seizure were made in violation of the Fourth Amendment, there is no reason why one whose rights have been so violated and who is sought to be incriminated by evidence so obtained, may not invoke protection of the Fifth Amendment immediately and without any application for the return of the thing seized. *A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.*" (Italics ours.)

But counsel say to appellant, "You did not claim the liquor taken under the alleged void warrant, and consequently you are estopped from attacking the warrant under which the liquor was taken. Because defendant refused to testify to an untruth—refused to say the liquor was his own property—he was estopped from attacking the void

warrant under which it was taken and which supplied the evidence by which he was convicted.

Courts and Prosecuting Attorneys seem to overlook the facts that quite frequently defendants have told juries the truth which juries refuse to believe. Quite often we read in the papers that some defendant, who declared his innocence to a jury, but was disbelieved, was convicted and executed, and thereafter the true murderer was revealed by death bed confession. These mistakes will occur. No power on earth will prevent some miscarriage of Justice. But punishment based on wrongful judgment of questions of law can be prevented, and should be. It is possible and most probable that defendant told the truth. There are many facts and circumstances that confirm that belief. One of the defendant's strongest defenses was taken away from him because he said he did not own the liquor seized. The fact that he was, however, found guilty and sentenced to imprisonment—the fact that the jury found against him with regard to the owner ship of the liquor shows that in *some way or in some manner,* the defendant was entitled to have the motion to suppress heard on its merits and sustained. He was deprived of that defense under a rule of estoppel which can perhaps be approved

in civil practice, but is a glorious misfit under criminal proceedure. The jury by its verdict said the liquor belonged to defendant. Then he is entitled to have the question of suppression litigated. We cannot get away from the defendant's claim that *in some way or in some manner* defendant was entitled to any and all evidence that will free him from the charge made against him.

In time the claims of estoppel approved by some courts, and invoked by the District Attorney in this case, must be discarded. The plea that a defendant is estopped or can ever be estopped from pleading that a writ is void under any and all circumstances and conditions when such a plea will produce an acquittal cannot long prevail.

Matusake, the defendant, as a part of his defense, asked the court to suppress the evidence that brought on his conviction. There was other evidence to suppress besides the liquor. There were keys and private papers. With the suppression of the evidence, conviction would not have been possible. The court virtually said by is ruling, though the search warrant is void, though the suppression of the evidence secured under the void warrant would bring about an acquittal, you shall by the action of

the jury, if so inclined, be convicted under the rule of estoppel.

To be found guilty by evidence unlawfully secured, under a search warrant, declared void in England from the time of Lord Coke to the trial of *Entick vs. Carrington* in 1765, and again declared void by the House of Commons in 1766, void under the common law in America, until the adoption of the Constitution and then made void by the Fourth Amendment in 1791 and again one hundred and thirty-five years thereafter, made void, by an Act of Congress of June 15th, 1917, is a misfit to the Constitutional rights guaranteed to persons charged with crime and the presumption of innocence. The principles of right and eternal justice would turn pale and tremble at the thought of generally applying the principles of estoppel in civil causes to that of criminal proceedure. It cannot be done, except in a few isolated cases, without destroying the constitutional rights that have in the past, if not to the same extent at the present time, been held so dear and sacred by a great majority of the American people and American Courts. *Buty vs. Goldfinch,* 74 Wash. 532.

Estoppel in criminal causes is a dangerous

weapon, and we might say, of quite recent origin, although to a degree, its principles in very rare cases have always been recognized. We refer to estoppel in *pais*. Some writers on criminal law and proceedure do not index the word. Wharton on Criminal Evidence speaks only of estoppel as it relates to judgments. One writer, in his encyclopedia, states, that the courts are divided as to whether the estoppel in civil practice should be applied to the criminal proceedure. Black's Law Dictionary is silent as to criminal estoppel.

The name, as a matter of law, is a complete misfit. There could be none other than estoppel in *pais* in this case, and what the defendant said or did fits no estoppel as described by all the writers. Matusake said: "I don't own the liquor—the expressman leased the rooms from me, I only go in to fire the boilers." There was no deception. He made no statement to any person or officer which induced the latter to act upon. The raid was evidently made on the theory that the soft-drink manufacturer owned the liquor but defendant produced a lease and told the officers that the expressman owned the liquor. Defendant's possession was limited. He was not named in the warrant. The door was broken open and his leased property

damaged. Why should he not be permitted to urge upon the court the contention that the warrant was void?

One who reads our State and Federal Constitutions, the United States and various State laws, will most readily come to the conclusion that a person charged with crime in our courts, and especially the courts of the United States, will receive the benefits of the declared constitutional rights.

Has appellant, Matusake, had such a trial in this case? We think not, and our reasons are, that he was arrested by virtue of a search and seizure warrant that failed to describe the place to be searched and failed to state the defendant's name and which for other numerous reasons, shown in our opening brief, was absolutely void; his person was searched, his private papers, keys, etc., forcibly taken from him and he was brutally assaulted by an agent to whom he did not speak a word, and his only offense was to ask Agent Whitney to return to him the signed copy of the lease.

Counsel for the Government cite a few cases commencing with *Hale vs. Henkel,* 201 U. S. 43.

Mr. Justice Brown delivered the opinion of the court, in which it is said that two issues are pre-

sented, the first of these involves the immunity of the witness from oral examination, and the second the legality of his action in refusing to produce the documents called for by the *subpoena duces tecum*. This case was decided March 12th, 1906.

Bordeau vs. McDowell, 256 U. S. 465, is also a civil action and holds that stolen papers, when the thieves are not Government officials, may be used by the Government in presenting a cause to a grand jury. Justices Brandies and Holmes dissented. A perusal of the majority opinion, justifies the dissenting opinions.

Remus vs. U. S., 268 Fed. 501, is a mistaken citation.

Haywood vs. U. S., 287 Fed. 69, is also a mistaken citation.

Possibly *Luseo vs. U. S.* of the same volume and page was intended.

In this case the court holds that a co-defendant could not claim protection against unlawful search of co-defendant's premises. The rights of a co-defendant are not involved in this cause. Defendant simply says he was not the owner of the liquor seized and told the officers the lessee was the guilty party.

Schwartz vs. U. S., 294 Fed. 528, is a Texas court decision. One of the three defendants appealed. The question whether appellant's home was searched without a warrant was involved. The court found that it was not his home. This case holds that the search of the premises without a warrant where the officers saw a still, through an open door, was legal. In other words, that no search warrant is necessary if the officers know the prohibition law is being violated on suspected premises. If such is the law, what will become of the Fourth Amendment and the Search and Seizure Act of Congress of June 15th, 1917? Also the *Boyd; Guled* and the recent decision of *Agnello vs. U. S.,* cited by counsel for the Government? A positive requirement is that the officers *must* know that the law is being violated before any search warrant dare be issued, and more, the affidavit and warrant must show such knowledge and the corroborating witness must be named in the papers. The issuance of a search warrant prior to the enactment of the Volstead Act was considered a serious matter. The many decisions of the Supreme Court of the United States shows beyond the question of a doubt, that a search warrant must not be issued until the court issuing the same is supplied with evidence that

establish beyond doubt that an offense had been committed. Shall the sacred Fourth Amendment to the Constitution and the Search and Seizure Laws, enacted by Congress be swept aside, annulled and made useless in order that the man who carries a pint of liquor in his hip pocket, may be convicted of a misdemeanor, fined and sent to jail?

However, in the last case cited in the brief of the District Attorney's office, that of *Angello vs. U. S.,* 269 U. S. Sup. Court, pg. 20, Justice Butler sweeps aside that part of the *MacDaniel* and *Schwartz* cases that tended to legalize the unlawful search of premises without a search warrant.

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant," said Justice Butler.
>
> *MacDaniel vs. U. S.,* 294 Fed. 769.

This is a Circuit Court decision from Ohio, in a case charging conspiracy. It decides nothing new or startling and has only a trifling bearing on the issues involved in this case.

If the great Government of the United States can lawfully use this warrant to commit these depredations, to arrest the defendant, search his premises, brutally assault him and with the aid of

their unlawful acts, convict him, will the court say he is getting a fair trial when it denies to the defendant the right to protest against the use of the warrant for such unlawful purposes, and to plead its invalidity?

When all of the errors of law have been considered, our final appeal to the court is that the evidence is insufficient upon which to base a verdict of guilty.

The evidence in the record shows the defendant a man of spotless character and reputation. He told the officers that the lessee was the owner of the contraband liquor. He and his wife made search for him. He was promised immunity if he produced the expressman. He could not be found. No effort was made by Mr. Whitney to apprehend him. Too much trouble to make a search for the guilty person. An innocent person was made a substitute. He now pleads for justice.

Very respectfully submitted,

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